IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VITALIS OGUTU,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-05647
	:	
v.	:	
	:	
LEHIGH VALLEY APARTMENTS, et al.,	:	
	:	
Defendants.	:	

Stengel, J. February 27, 2006

MEMORANDUM AND ORDER

Plaintiff Vitalis Ogutu brings this negligence action against defendants Lehigh Valley Apartments and Samuel Geltman and Company, Inc. for the death of his daughter. Presently before the Court is Defendants' motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. For the reasons described below, I find that Defendants have not met this standard and I will deny the motion.

I. BACKGROUND[1]

On July 28, 2003, Loreen Tambo (the "decedent"), the 19 year old daughter of Plaintiff, drowned in a swimming pool owned and operated by Defendants. Earlier that

[1]The following factual recitation is taken in the light most favorable to Plaintiff, the non-moving party, and is gleaned from Plaintiff's opposition to the motion for summary judgment and the evidence in the record.

day the decedent and her friend Samantha Owuor decided to swim in the pool, which is located at Defendants' apartment complex in Whitehall, Pennsylvania. The decedent enjoyed playing in water despite being unable to swim, and Owuor had observed her playing in a waist-deep pond at a park on at least one other occasion. The decedent did not live at the apartment complex[2], but Owuor resided there on the date in question with her mother and a roommate.

Defendants required each of their residents' guests to present a swimming pool guest pass to the lifeguard on duty in order to be granted entry into the pool area. Guest passes were obtained from the Lehigh Valley Apartments Rental Office (the "Rental Office"), and only residents of the apartment complex were permitted to obtain guest passes from the Rental Office. Moreover, each apartment in the complex could obtain no more than two guest passes, and the lending of guest passes resulted in the suspension of pool privileges.

Owuor visited the Rental Office in the early afternoon of July 28, 2003 to procure a guest pass for the decedent, but the Rental Office denied Owuor's request because she did not have her apartment complex resident card with her. Owuor then telephoned her friend Terry Ogolla, another resident of the apartment complex, and informed Ogolla that neither Owuor nor the decedent would be able to go swimming that day. Ogolla responded that she had two guest passes available, and that Owuor and the decedent could

[2]The decedent had eventually planned to move into the apartment complex with her father (Plaintiff). Plaintiff previously signed a lease with Defendants which was scheduled to commence on August 15, 2003.

use them to go swimming with her (Ogolla). Ogolla subsequently met Owuor and the decedent at the pool area where she gave them each a guest pass. After Owuor and the decedent presented their passes to the lifeguard on duty, all three women entered the pool area. The decedent climbed into the pool at some point after entering the pool area.

Defendants' pool is between four and five feet deep at one end (the "shallow end") and is nine feet deep at the other (the "deep end"). There is some dispute as to whether the decedent entered the pool in the shallow end or the deep end, but there is no dispute that she did not inform the lifeguard that she could not swim. Owuor decided to return to her apartment later that afternoon and asked the decedent if she wanted to leave the pool as well. The decedent declined and remained in the pool while Owuor went back to her apartment.

Defendants provided their lifeguards with an unelevated white lawn chair situated approximately ten feet from the edge of the pool. The lifeguard on duty generally sat in this chair while observing swimmers in the pool. Tahirah Silver, the lifeguard on duty, observed the decedent playing in the pool several times throughout the afternoon. At approximately 6:30 pm, while Silver was seated in the white lawn chair, two boys who had been playing in the deep end of the pool began yelling for help. Silver jumped up from the lawn chair and ran to the deep end of the pool, where she found one of the boys treading water and attempting to hold the apparently unconscious decedent's head above water. Silver removed the decedent from the pool and, after detecting a faint pulse, began

administering CPR. Silver also instructed the boys to call 911, and emergency medical personnel arrived at approximately 6:45 pm. The medical personnel continued Silver's resuscitation efforts and transported the decedent to Sacred Heart Hospital. The hospital pronounced the decedent dead at 7:43 pm and listed drowning as the cause of death.

Plaintiff commenced this lawsuit on October 9, 2003, alleging two counts of negligence for the death of the decedent, and seeking monetary damages in excess of $100,000.00, as well as interest and costs. Defendants filed their motion for summary judgment on December 15, 2005.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted). The moving party, however, need not offer evidence to negate

matters on which the non-moving party bears the burden of proof at trial if the evidence offered in support of the moving party's motion establishes each essential element of that party's claim or defense. Celotex, 477 U.S. at 323.

Once the moving party has carried its burden, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings, and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id. This specificity requirement upholds the underlying purpose of summary judgment, which is "to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." Fries v. Metro. Mgmt. Corp., 293 F. Supp. 2d 498, 500 (E.D. Pa. 2004) (citing Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1975), cert. denied, 429 U.S. 1038 (1977)).

When analyzing a motion for summary judgment, a district court "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. There is a genuine issue of material fact as to whether the decedent entered Defendants' property as a trespasser or licensee because a reasonable jury could find that she obeyed the pool rules.

"Federal courts sitting in diversity apply state substantive law and federal procedural law" pursuant to Erie R. Co. v. Tompkins. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 613 (3d Cir. 1992). Accordingly, Pennsylvania substantive law applies in this diversity action. In Pennsylvania, the duty that a possessor of land owes to a third party who enters the land depends on the surrounding circumstances. One of those circumstances is whether the third party is a trespasser, licensee, or invitee. See Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983). The determination of a land entrant's status is generally a question of fact for the jury. Palange v. City of Philadelphia, 640 A.2d 1305, 1307 (Pa. Super. Ct. 1994) (holding that the trial court properly submitted the issue of a land entrant's status to the jury).

Defendants argue that the decedent's status on their land was that of a trespasser. The Restatement (Second) of Torts defines a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." RESTATEMENT (SECOND) OF TORTS § 329; Rossino v. Kovacs, 718 A.2d 755, 756-57 (Pa. 1998) (quoting section 329 of the Restatement (Second) of Torts). The duty of a possessor of land to a trespasser in Pennsylvania is merely to refrain from willful or wanton misconduct.[3] Estate of Zimmerman v. Southeastern Pa. Transp. Auth., 17 F. Supp. 2d 372, 380 (E.D. Pa. 1998) (citations omitted); Ott v. Unclaimed Freight Co., 577 A.2d 894, 897 (Pa. Super. Ct. 1990) (citations omitted).

Plaintiff counters by arguing that the decedent's status on Defendants' land was actually that of a licensee. The Restatement (Second) of Torts defines a licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT (SECOND) OF TORTS § 330; Rossino, 718 A.2d at 757 (quoting section 330 of the Restatement (Second) of Torts). The duty a possessor of land owes to a licensee in Pennsylvania is higher than that owed to a trespasser. As a result, a plaintiff

[3]The Pennsylvania Supreme Court has determined that "willful misconduct" means that the defendant either (1) desired the result that occurred; or (2) was aware that the result was substantially certain to occur. Evans v. Phila. Transp. Co., 212 A.2d 440, 447 (Pa. 1965). "Wanton misconduct" means that the defendant (1) has intentionally performed some unreasonable act in disregard of a known risk, or a risk that would be known to a reasonable person; and (2) the risk was so great that it was highly probable that harm would follow. Id. Wanton misconduct is typically accompanied by the defendant's reckless disregard of the consequences of his or her actions. Id.

who is found to be a licensee faces an easier burden of proof at trial than a plaintiff who is found to be a trespasser. Specifically, a possessor of land is liable for harm caused to a licensee by a condition on the land when:

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS § 342; Sharp v. Luksa, 269 A.2d 659, 661 (Pa. 1970) (quoting section 342 of the Restatement (Second) of Torts).

Defendants contend that the decedent entered the pool area as a trespasser because the Rental Office did not issue her a guest pass. Defendants are correct that the Lehigh Valley Apartments Swimming Pool Rules & Regulations (the "Pool Rules") require that all guests obtain a guest pass before using the pool. The Pool Rules at 1. However, the Pool Rules state that guest passes are to be obtained by *residents for their guests*, and not by the guests themselves. Specifically, the Pool Rules provide that "[g]uest passes must be obtained from the Rental Office by an adult resident only," and that "[g]uest passes must be presented to the lifeguard on duty." Id. While the Pool Rules do state that

"LENDING OF POOL TAGS WILL RESULT IN SUSPENSION OF POOL PRIVILEGES," they do not specify whether a resident must obtain guests passes on the date of use or if residents may "save" their guest passes. The Pool Rules at 1. Mary Hillenbrand, Defendants' employee responsible for issuing guest passes, testified that Defendants would issue "two [guest passes] to the leaseholder of each apartment per day." Hillenbrand Dep. at 30. Residents were also required to accompany their guests to the pool, and if the resident left the pool the guest was required to leave at the same time. The Pool Rules at 1. The pertinent issues to determining the decedent's status on Defendants' land, therefore, are (1) whether the decedent obtained a valid guest pass from an apartment resident; and (2) whether that resident remained with the decedent during her time at the pool.

In this case, a reasonable jury could rule in Plaintiff's favor on each of these issues. With regard to the first issue, there is evidence in the record that Terry Ogolla resided in one of Defendants' apartments. Owuor Dep. at 37. There is also evidence that the decedent and her friend Samantha Owuor obtained pool guest passes from Ogolla and presented these passes to the lifeguard on duty. Id. at 50. There is no indication in the record that Ogolla obtained the guest passes from anywhere other than the Rental Office.

With regard to the second issue, while Owuor testified that she left the pool and went back to her apartment, there is evidence suggesting that Ogolla, another resident of the apartment complex, remained with the decedent at the pool. See, e.g., Ogolla Aff. at 2 (stating that when Ogolla left the pool, she had been told that the decedent had already left). Thus, the record provides at least some indication that the decedent followed the Pool Rules when she entered the pool area, and a reasonable jury could find that the decedent entered Defendants' land as a licensee. As a result, there is a genuine issue of material fact as to the decedent's status upon her entry into the pool area.

B. Defendants' motion should be denied because Plaintiff has demonstrated a triable issue of fact as to each element of section 342 of the Restatement (Second) of Torts.

Even if I find that the decedent did enter the pool as a licensee, I must still find that there is no genuine issue of material fact with regard to any element of section 342 of the Restatement (Second) of Torts to grant Defendants' motion for summary judgment. The record demonstrates that there is such an issue as to the first element of section 342—whether Defendants knew the pool presented an unreasonable risk of harm and that the decedent did not realize the danger.

In this case, the record provides a number of facts suggesting that Defendants knew their pool presented an unreasonable risk of harm. First, as described above, the Pool Rules limited the number of guests who could enter the pool area and required those guests to follow a number of rules during their visit. See Pool Rules at 1. Moreover,

Defendants employed Mary Hillenbrand to issue pool guest passes to apartment complex residents and their guests. Hillenbrand Dep. at 33. A jury could reasonably imply from these facts that Defendants imposed such rules in the pool area because they knew the pool created an unreasonable risk of harm. Second, Defendants posted two signs on their land: a "No Trespassing" sign as well as a sign stating that Defendants were not responsible for any injuries occurring in the pool area. Id. at 132. The signs could imply that Defendants knew the pool created a dangerous condition on their land. Finally, markers along the side of the pool indicated the depth of different sections, and a rope line separated the shallow end of the pool from the deep end. Silver Dep. at 114-116. A reasonable jury viewing these facts in the light most favorable to Plaintiff could conclude that Defendants realized that the pool created an unreasonable risk of harm and that entrants would not discover or realize this risk. Accordingly, I find that there is a genuine issue of material fact as to the first element of section 342 of the Restatement (Second) of Torts.

There is also a triable issue of fact as to whether Defendants exercised reasonable care in making the pool safe—the second element of section 342. The Third Circuit has held that evidence of a lifeguard's failure to utilize a lifeguard "perch," which provided the best observation vantage point of a swimming pool, presents an issue of fact for the jury. Onufer v. Seven Springs Farm, Inc., 636 F.2d 46, 48-49 (3d Cir. 1999). In Onufer, the Third Circuit reversed the district court's grant of summary judgment based on

evidence that the lifeguard had failed to use the lifeguard perch and that the lifeguard's attention was diverted from the swimming pool while he monitored admission to the pool area. Onufer, 636 F.2d at 48-49.

In this case, Tahirah Silver testified that she used a non-elevated "regular white lawn chair" while working as a lifeguard at the pool. See Silver Dep. at 40. Silver also testified that she could not see the bottom of the deep end from her chair and that she did not see the decedent submerged in the deep end of the pool until after the boys brought it to her attention. See Silver Dep. at 75, 78. It is uncontested that Silver assumed the responsibility of admitting persons into the pool area. See Owuor Dep. at 50 (stating that Ogolla presented two guest passes to Silver). See also The Pool Rules at 1 ("Guest passes must be presented to the lifeguard on duty").

Dr. Jerome Modell's preliminary report provides evidence that the decedent had been submerged for between four and one-half to five minutes before being removed from the pool. See Preliminary Report of Dr. Jerome H. Modell dated December 20, 2005 (noting that medical evidence supports this conclusion). Dr. Modell's report also states that (1) there is an excellent prognosis for drowning victims when effective resuscitation is started within one and one-half to two minutes of submersion; and (2) a majority of victims will be resuscitated when effective resuscitation is started within three minutes of submersion. Id. According to Dr. Modell's report, a difference of less than one minute between submersion and resuscitation may have saved the decedent's

life. After viewing these facts together, a jury could reasonably conclude that Silver would have seen and rescued the decedent more quickly if Defendants had provided an elevated lifeguard chair. In other words, Defendants may not have exercised reasonable care in making their swimming pool safe by failing to provide their lifeguards with an elevated lifeguard chair. Accordingly, a genuine issue of material fact exists with regard to the second element of section 342 of the Restatement (Second) of Torts under Onufer.

Finally, there is a genuine issue of material fact regarding whether the decedent knew or had reason to know of the risk of swimming in Defendants' pool without a lifeguard—the third element of section 342. Whether a licensee knew or should have known about the danger arising from a condition on a possessor's land, and the risks associated with that condition, are generally questions of fact for the jury. Himes v. New Enter. Stone & Lime Co., Inc., 582 A.2d 353, 358 (Pa. Super Ct. 1990) (citing Carrender, 469 A.2d at 124). The Court may decide this question, however, when reasonable minds could not differ as to the conclusion. Id.

In this case, Owuor testified that the decedent enjoyed playing in bodies of water despite being unable to swim. Owuor Dep. at 12. Owuor also testified that she had previously observed the decedent playing in a waist-deep pond in a park. Id. A reasonable jury could, therefore, conclude from these facts that the decedent did not realize the risk of playing in a pool with a lifeguard on duty despite being unable to swim. Moreover, there is conflicting evidence as to whether the decedent entered the

deep end of Defendants' pool or if she remained in the shallow end. On the one hand, Owuor testified that she and the decedent entered the "[nine] foot area of the pool first." Owuor Dep. at 62. On the other, Silver's testimony indicates that she only saw the decedent in the "four or five foot section" of the pool. See Silver Dep. at 68-69, 71. One of the boys who discovered the decedent submerged under water in the deep end of the pool also stated that he had not previously seen her in that end of the pool. Jurry Aff. at 1.

Issues of witness credibility are typically reserved for the jury, see United States v. Abel, 469 U.S. 45, 52 (1984), and a reasonable jury could determine from these facts that the decedent did not and should not have appreciated the risk inherent in playing in the shallow end of a pool with a lifeguard on duty despite being unable to swim. Accordingly, I find that there is a genuine issue of material fact as to the third element of section 342 of the Restatement (Second) of Torts.[4]

IV. CONCLUSION

For the reasons described above, I find that there are genuine issues of material fact which must be determined at trial. Accordingly, Defendants' motion for summary judgment is denied. An appropriate Order follows.

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[4]I need not consider Defendants' assumption of the risk argument. The Pennsylvania Supreme Court has held that Pennsylvania courts may determine the issue of assumption of the risk during the duty analysis in a case involving a possessor of land's liability to a licensee. Howell v. Clyde, 620 A.2d 1107, 1110-11 (Pa. 1993) (citing Carrender, 469 A.2d at 124).

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LEHIGH VALLEY APARTMENTS, et al.,	:	
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Defendants.	:	

ORDER

AND NOW, this 27th day of February, 2006, upon consideration of the Motion for Summary Judgment of Defendants, Lehigh Valley Apartments and Samuel Geltman Company, Inc. (Docket No. 46) and Plaintiff's response thereto (Docket No. 49), it is hereby **ORDERED** that the motion is **DENIED**.

It is **FURTHER ORDERED** that the Motion of Defendants, Lehigh Valley Apartments and Samuel Geltman and Company, Inc., For Leave to File a Reply to Plaintiff's Response to Motion for Summary Judgment (Docket No. 52) is **DENIED**.

BY THE COURT:

/s Lawrence F. Stengel
LAWRENCE F. STENGEL, J.